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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 593

VITO GRIMALDI,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Division, entered in the above entitled case on June 15, 1970.

A. Opinions Below

There were no opinions rendered by any of the Courts of the State of New York in connection with the proceedings in this case.

B. The Grounds Upon Which the Jurisdiction of This Court Is Invoked

Jurisdiction in this Court is invoked under Title 28, U.S. Code §1257(3) and Rule 19, Subdivision 1 of the rules of this Court.

The judgment sought to be reviewed herein is the judgment of the Appellate Division, Second Judicial Department made on June 15, 1970 as aforesaid, and annexed hereto as Appendix A.

C. Questions Presented for Review

1. Does it violate the constitutional right to the assistance of counsel to deny a witness whose presence before a Grand Jury is compelled by subpoena, the right to have his counsel physically present with him in the Grand Jury room in order to protect his legal rights when he is being interrogated therein?

2. Does it violate the constitutional right of the petitioner when he is not advised of the proper scope of immunity and the crimes he can be prosecuted for even after immunity is conferred?

3. Does it violate the petitioner's right against self-incrimination when he is indicted for criminal contempt before he has had an opportunity to purge himself of the judgment for summary contempt?

D. Constitutional Provisions and Statute Involved

The constitutional provisions involved herein are those portions of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution relating respectively to the privilege against self-incrimination, to the right to the assistance of counsel and to due process of law.

The statute involved is Section 750 of The New York Judiciary Law dealing with punishment for contempt of Court in refusing to answer lawful interrogatories.

Pertinent parts of each of the foregoing is set forth verbatim in this petition as Appendices C, D, E, and F respectively.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

The petitioner, Vito Gravallese, had been subpoenaed to appear before the Grand Jury in Kings County to give testimony. After a number of adjournments he appeared before the Grand Jury on January 8, 1970 and January 22, 1970. On January 8th he was advised of his rights to counsel outside the Grand Jury, to refuse to answer on the ground of self-incrimination, and that if he did so he could be granted immunity by the Grand Jury and the extent of that immunity. In this same session he was excused and the Grand Jury voted him immunity. The District Attorney then purported to advise him of the extent of this immunity in the following language:

> "In other words, if you testify to a question, your answers can never be used against you in any future criminal proceeding in any court of law. If you admit, for instance, to a burglary, and were questioned about this event here, and you admitted you caused the burglary, you can never be prosecuted for that crime. That is the law in New York State as of today.
>
> Q. Do you understand that you can never be arrested for that crime? Do you understand that?"

He was thereafter granted an adjournment to January 22, 1970 when he returned. He was once again asked certain

introductory questions and in furtherance thereof he was told he could not be prosecuted for crime in the State of New York. When he reasserted his Fifth Amendment privilege he was told that there were two crimes he could be convicted of even with the granting of immunity. The two crimes he was told of were civil or criminal contempt. When he adhered to his position he was excused. An order to show cause was brought to punish him for summary contempt. In opposition thereto the arguments were raised that he did not have counsel in the Grand Jury and that the advice of immunity was inadequate. Further, it was contended that the advice of what crimes he could be punished for even with the grant of immunity was also inadequate, since possible prosecution for perjury was omitted. All of these contentions were overruled and he was adjudged in contempt and sentenced to thirty (30) days' imprisonment and a $250 fine, or in lieu thereof to serve an additional thirty (30) days in jail.

An appeal was taken to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. Pending the determination of that appeal that Court stayed execution of the order below adjudging petitioner in contempt and imposing the aforesaid jail sentence and money fine.

Thereafter, on June 15, 1970, the contempt adjudication was affirmed without opinion by the Appellate Division.

Thereafter, an application was made to the Court of Appeals of the State of New York for leave to appeal to that Court. That application was denied on July 6, 1970. An application for a stay of the commitment order pending the filing of the petition for certiorari was denied by the

New York Court of Appeals. While the appeal was pending before the Appellate Division the petitioner was indicted for criminal contempt. The basis of this indictment was his failure to testify before the Grand Jury on January 22, 1970. It was contended on the application to the New York Court of Appeals that this prevented the petitioner from purging himself of the summary contempt. The basis for this contention was that if he elected to purge himself he would be incriminating himself of the charge contained in the criminal contempt indictment. This argument was rejected.

Thereafter, an application for a further stay of the commitment order was timely made to the Hon. John M. Harlan, an Associate Justice of this Court. On July 29, 1970 Mr. Justice Harlan granted such a stay upon condition that this petition be filed in this Court on or before August 26, 1970. Mr. Justice Harlan endorsed on the application the following:

> "In light of the pendency for argument next term of No. 97, *Piccirillo* v. *New York*, I am constrained to grant a stay, conditioned however as provided in the order I am signing today. JMH 7/29/70".

F. Argument Amplifying the Reasons Relied on for Allowance of the Writ

POINT ONE

It was a deprivation of petitioner's constitutional right to the assistance of counsel to refuse petitioner's request to have his counsel physically present with him in the Grand Jury room during his interrogation by the Grand Jury.

The constitutional right to the assistance of counsel has been greatly enlarged in recent years. More significantly, this Court has upheld the right to counsel in various critical situations apart from an actual trial (*Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *U. S.* v. *Wade*, 388 U.S. 218 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1968); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

See also, Meshbesher, *Right of Counsel Before Grand Jury*, 41 F.R.D. 189.

The basic reason for denial by State Courts of the right to counsel inside the Grand Jury room is the desire to preserve the secrecy of the proceedings. More specifically, this desire for secrecy is generally sought to be bolstered by corollary propositions:

1. To prevent escape by prospective defendants.
2. To prevent prospective defendants or others from seeking to importune grand jurors.
3. To prevent tampering with witnesses.
4. To encourage witnesses to testify uninhibitedly without fear of disclosure.

5. To protect the prospective defendant from disclosure to others of the existence of an investigation directed toward him.

See, *U. S.* v. *Procter and Gamble Co.*, 356 U.S. 677, 681 n. 6 (1958); *U. S.* v. *Rose*, 215 F.2d 617, 628-629 (3 Cir., 1954).

None of these reasons would be applicable to the case at bar. The first three reasons are predicated upon the assumption that the prospective defendant is unaware of the Grand Jury proceedings. Such reasons are hardly supportable where, as here, the petitioner was brought before the Grand Jury under compulsion of subpoena by the prosecutor himself.

The fourth reason relates to keeping secret the identity and testimony of witnesses other than the petitioner. Such secrecy would be unaffected by the appearance of the petitioner.

The fifth reason contemplates improper disclosure of the proceedings by members of the Grand Jury or the prosecutor or other persons apart from the petitioner. New York Law does not prohibit a witness before a Grand Jury from disclosing the fact that he testified or the testimony given by him (*People* v. *Minet*, 296 N.Y. 315).

Thus, once a witness is brought before a Grand Jury, all of the reasons underlying the need for secrecy necessarily become meaningless *as to him*.

If we are correct in that aspect, it would also follow that the physical presence of his counsel in the Grand Jury room simultaneously with him would in no way prejudice the secrecy requirements. What is known to the

witness must be made known to his counsel. This would be particularly true where, as in this case, the witness' presence was secured by the compulsory force of a subpoena.

The right to the physical presence of counsel in the Grand Jury room does not appear to have been directly considered by this Court. But see, *In re Groban*, 352 U.S. 330 (1957) and *Anonymous v. Baker*, 360 U.S. 287 (1959).

In re Groban, this Court held valid an Ohio statute authorizing a Fire Marshal's right to exclude counsel's presence when questioning a witness at an investigatory proceeding to determine the cause of a fire. Analogy was drawn between the right to counsel before a Grand Jury and before "other investigatory bodies" (*id.* at p. 333). The Court noted that the right to counsel was not constitutionally mandated in either situation.

In *Anonymous v. Baker*, this Court, drawing the same analogy, held that a Court ordered secret inquiry into unethical practices by attorneys did not constitutionally mandate a witness' right to have counsel present when being interrogated.

As indicated, *Baker* and *Groban* did not directly reach the issue raised herein. Nonetheless, while the language of those cases would appear to militate against petitioner's position herein, it might also be respectfully noted that they precede in point of time the entire series of Sixth Amendment opinions promulgated by this Court during the past decade.

We, therefore, respectfully urge that the issue herein raised squarely for the first time be considered by this Court.

POINT TWO

It was a deprivation of petitioner's constitutional right to fail to grant him the required immunity and properly advise him of the extent of prosecution he was liable to.

Section 619-c of the New York State Code of Criminal Procedure provides for the granting of immunity as follows:

> ". . . 2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt."

Examination of the statute clearly indicates that it grants the constitutionally required "transactional immunity." *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

The immunity conferred herein is contained in minutes of the proceedings on January 8, 1970. The language used falls short of the statutory and judicial require-

POINT THREE

It was a violation of the petitioner's rights under the Fifth Amendment to indict him for criminal contempt before he had exhausted all his appeals from the judgment of summary contempt.

It is submitted that since his legal arguments against testifying before the Grand Jury have been overruled, should he now wish to purge himself of the summary contempt he is prevented from doing so. He is prevented from doing so by virtue of the indictment. For should he testify, in an endeavor to purge himself, he is admitting

a. That the Grand Jury investigation is relevant.

b. That he has information pertinent to that investigation.

c. That his failure to testify was willful and intentional.

These are all necessary elements that the prosecution would have to prove in order to convict him of the contempt for which he was intlicted.

Thus, it is submitted that his position is not dissimilar from the position faced by the defendants in the gambling stamp tax cases, viz., *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968). Nor is it dissimilar from the position in the gun licensing cases, viz., *Haynes* v. *United States*, 390 U.S. 85 (1968) or the marijuana cases, *Leary* v. *United States*, 395 U.S. 6.

In order for Grimaldi to comply with the Judge's order to testify, he must now incriminate himself by giving testimony which will convict him of the crime charged in the pending indictment.

CONCLUSION

The Writ of Certiorari herein prayed for should be granted.

Respectfully submitted;

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